Costs assessor selection: A question of timing, or cost?

When parties disagree on the selection of a costs assessor, will the registrar favour the first nominated, the one with the lowest hourly rate, or look at other criteria? ***Sheryl Jackson*** *reviews a Court of Appeal decision which canvassed these issues.*

Assessment of costs – discretionary considerations in appointing assessor – assessor's fee – consent filed first in time

In *Lessbrook Pty Ltd (in liq) v Whap; Stephen; Bowie; Kepa & Kepa* [2014] QCA 63 the Queensland Court of Appeal dealt with significant questions of general application relating to the appointment of assessors to conduct an assessment of costs under the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR).

Facts

The plaintiffs had been successful in the main proceedings.

On applications by the parties, which were heard together, the registrar had appointed a costs assessor nominated by the defendant. The defendant had nominated three assessors, with hourly fees of $275, $316 and $400. The plaintiff nominated one assessor, with an hourly fee of $300. The registrar had appointed the assessor with the lowest hourly fee.

The plaintiffs applied under r791 of the UCPR (Rehearing after decision of judicial registrar or registrar) for leave to have the application to the registrar reheard by the court on the grounds that no reasons were provided for the registrar's decision and the decision was made when the defendant's submissions to the registrar contained a fundamental error. The primary judge was satisfied that erroneous material had been included in submissions before the registrar, and that the discretion should be exercised afresh.

The primary judge noted that r713 of the UCPR (Costs assessor if no agreement) did not provide any relevant guiding statutory criteria, and that here there was no material bearing on the suitability of any of the nominated assessors. It was accordingly necessary to determine who should be appointed from a selection of ostensibly suitable nominees.

His Honour did not regard the variation in the hourly rates of nominated assessors as of itself sufficiently material to provide a determinative basis for favouring one assessor over another. He observed that an experienced assessor may charge more per hour for an assessment but take fewer hours to complete it than a less experienced colleague. The primary judge was also unpersuaded by the submission for the defendant that there should at least be a preference for one of its three nominees in circumstances in which the plaintiff had nominated only one person.

There was uncontested evidence before the court of a convention, or practice, in the Brisbane and Townsville registries that, when there was no agreement between the parties on a costs assessor, the registrar hearing the application would appoint the costs assessor

whose consent to act as costs assessor was first filed, unless there was evidence of unsuitability. It was noted this will generally be the assessor nominated by the party whose costs are to be assessed.

The primary judge noted that the practice might reflect weight being given to the successful party's choice, but concluded that this reflected weight given to expedition, and this was consistent with r5 of the UCPR. He was satisfied that, in the absence of any reason of substance favouring the selection of one assessor over another, the question of which assessor's consent to act as a cost assessor was first filed was an appropriate discretionary consideration in determining the appointment. The primary judge appointed the assessor nominated by the plaintiff, being the costs assessor whose consent was first filed.

The defendant appealed to the Court of Appeal.

Legislation

Rule 687(1) of the UCPR requires that if under the rules or an order of the court a party is entitled to costs, the costs are to be assessed costs.

Rule 713 of the UCPR makes provision for the appointment of a costs assessor if the parties cannot agree that a costs assessment be carried out by a particular costs assessor. It provides:

> 713. **Costs assessor if no agreement**
>
> (1) This rule applies if the parties do not agree that a costs assessment be carried out by a particular costs assessor.
>
> (2) A party may either—
>
> (a) apply to the registrar for appointment of a costs assessor for the costs assessment; or
>
> (b) apply to the court for directions.
>
> (3) If an application is made under subrule (2)(a), the registrar may order the appointment of a particular costs assessor to carry out the costs assessment.

Section 64(1) of the *Supreme Court of Queensland Act 1991* (Qld) provides that: "An appeal only in relation to costs lies to the Court of Appeal from a judgment or order of the court in the Trial Division only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another judge of the court in the Trial Division."

Discretionary considerations

The lead judgment was delivered by Muir JA (with whose reasons Gotterson JA and Daubney J agreed). His Honour first analysed (at [15]-[21]) relevant provisions of Part 3 of chapter 17A of the UCPR in relation to the assessment of costs other than under the *Legal Profession Act 2007*, and also relevant rules relating to the appointment and registration of costs assessors.

Muir JA then considered whether the exercise of the primary judge's discretion miscarried. Reference was made to the principles applicable to an appeal against an order involving the exercise of a discretion as set out by the High Court in *King v King* (1936) 55 CLR 499 at 504-505. That case established that it must appear that some error has been made by the primary judge in the exercise of the discretion. Muir JA found it to be apparent from the brief analysis of the relevant rules that had been set out (see esp. rr710(2), 743K(1), 743M, 743N and 743O) that they attach considerable significance to the hourly rates of costs assessors. His Honour said (at [27]):

"The primary judge erred, with respect, in concluding on the basis of considerations such as this that all things were equal. They were not. It was not disputed that there was no evidence to distinguish between the assessors proposed by the parties in terms of experience, skill, diligence, expedition or availability but there remained an obvious criterion for distinguishing between them: the hourly rate of charge."

The court found that the difference of $25 an hour between the respondent's nominee and the assessor with the lowest rate nominated by the appellant could not be regarded as *de minimis.*

This conclusion meant it was not necessary to consider whether the primary judge had correctly placed emphasis on the date of filing of the assessors' consents. However, the Court of Appeal did deal with this because it raised a question of general application.

It was accepted that a party with the benefit of the costs order would normally have the greatest interest in expedition and it might also be relevant that such party's solicitors worked well with the costs assessor nominated by their client, and that they had found that assessor's work to be good in the past. In the view of the court, however, the closeness of such a relationship might be a matter that told against appointing that costs assessor.

The court also accepted that in some circumstances it might be obvious that the order of filing of the competing assessors' consents was a relevant factor in determining an application under r713. However, it emphasised that the losing party also had a strong interest in the costs assessment and that the party who had been ordered to pay the other party's assessed costs had the right under the rules to put forward its own nominee.

The court concluded that the primary judge's discretion miscarried, and that in the absence of any reasons for the selection of one costs assessor over the other, it was appropriate to appoint the costs assessor (as originally appointed by the registrar) with the lowest hourly rate.

Leave to appeal?

The Court of Appeal then considered whether the appellant required leave to bring the appeal to the Court of Appeal.

The appellant had applied to the primary judge for leave to appeal against the orders made by the primary judge setting aside the registrar's order and appointing the costs assessor

nominated by the plaintiff. The primary judge refused that application, and ordered that the appellant pay the respondent's costs of the application. His Honour held that the appellant required leave to appeal because the proposed appeal was "an appeal only in relation to costs" within the meaning of those words in s64 of the *Supreme Court of Queensland Act 1991* (Qld).

The Court of Appeal examined the authorities referred to in submissions for the respondent, including *Virgtel Ltd v Zabusky* [2009] 2 Qd R 293 and *ASIC v Jorgensen* [2009] QCA 20. The court also examined the nature of the appeal before it, and found that the matters for determination did not affect the original costs order in any way. It was concluded that s64 of the *Supreme Court of Queensland Act 1991* did not apply so as to require leave to bring the appeal to the Court of Appeal. The court stated (at [50]):

"There is no reason to suppose that the purpose of s64 is any different from the purpose of s253 of the 1995 Act as explained by Keane JA in *ASIC v Jorgensen.* That purpose and the historical construction of like provisions as well as the explanatory notes all suggest that 'in relation to' in s64 is not apt to include a relationship which does not bear upon the exercise of a judicial discretion in making or failing to make an order as to costs."

In light of this conclusion it was unnecessary for the court to rule on the application for leave. The court observed, however, that there was in this case a need to address a question of principle which may bear on the practice of registrars, and accordingly it would have been appropriate to grant leave had leave been necessary.

Orders

The appeal was allowed, and the orders of the primary judge were set aside. The respondent was ordered to pay the appellant's cost of each appeal and of the applications to the registrar.

As the primary judge had not erred in concluding that the registrar's appointment should be set aside because erroneous information had been taken into account, no order was made in relation to the appeal to the primary judge or as to the application for leave to appeal.

Comment

The decision will impact on the approach taken by registrars on applications under r713 of the UCPR for the appointment of a costs assessor. It may as a consequence reduce the fervour with which some practitioners have acted in endeavouring to file the consent of their preferred assessor first in time.

It is to be emphasised that the decision does not rule out the option for the appointment of a costs assessor with a higher hourly fee than other assessors put forward. It does, however, highlight the need for practitioners seeking the appointment of such an assessor to provide the registrar with objective evidence on which the proposed assessor might be preferred. This evidence may relate to criteria such as experience, skill, diligence, expedition or availability, or a combination of these factors.